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IN THE

Supreme Court of the United States

CAROL M. BROWNER,
Administrator of the Environmental Protection Agency, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMICI CURIAE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS AND CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. CONGRESS MAY NOT DELEGATE POLITICAL CHOICES BETWEEN COMPETING AND IRREDUCIBLE VALUES. 3

A. The Nature of Legislative Action. 5

B. The Requirements of Adequate Legislative Guidance to Executive Agents. 9

II. SECTION 7409 VIOLATES THE NONDELEGATION DOCTRINE BY NOT GUIDING THE VALUE CHOICES FACED BY EPA. 15

A. The Unguided Value Choice Delegated to EPA. 15

B. Mere Consideration of Costs and Benefits Offers No Intelligible Principle. 25

C. Invalidation Is The Appropriate Remedy For Improper Delegation. 27

CONCLUSION 28

TABLE OF AUTHORITIES

Pages

Cases

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935).....3, 11

Alden v. *Maine*, 527 U.S. 706 (1999).....4

American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946).....10, 11

American Trucking Ass'ns, Inc. v. *EPA*, 175 F.3d 1027 (CADC 1999) ("*ATA I*").....passim

American Trucking Ass'ns, Inc. v. *EPA*, 195 F.3d 4 (CADC 1999) ("*ATA II*").....6, 21, 28

City of Boerne v. *Flores*, 521 U.S. 507 (1997).....4

Environmental Defense Fund v. *EPA*, 598 F.2d 62 (CADC 1978).....25

Field v. *Clark*, 143 U.S. 649 (1892).....3, 6, 11, 15

Industrial Union Dep't, AFL-CIO v. *American Petroleum Inst.*, 448 U.S. 607 (1980) ("*Benzene*").....5, 6, 28

INS v. *Chadha*, 462 U.S. 919 (1983).....13

J.W. Hampton, Jr. & Co. v. *United States*, 276 U.S. 394 (1928).....3

Lead Industries Ass'n v. *EPA*, 647 F.2d 1130 (CADC), *cert. denied*, 449 U.S. 1042 (1980).....23, 24

Loving v. *United States*, 517 U.S. 748 (1996).....passim

Mistretta v. *United States*, 488 U.S. 361 (1989).....passim

Opp Cotton Mills, Inc. v. *Administrator, Wage and Hour Div. of Dept. of Labor*, 312 U.S. 126 (1941).....11

Pegram v. *Herdrich*, -- U.S. --, 120 S. Ct. 2143 (2000).....27

Seminole Tribe of Florida v. *Florida*, 517 U.S. 44 (1996).....4

Touby v. *United States*, 500 U.S. 160 (1991).....14

United States v. *Lopez*, 514 U.S. 549 (1995).....4, 7, 8

United States v. *Morrison*, -- U.S. --, 120 S. Ct. 1740 (2000).....4

Yakus v. *United States*, 321 U.S. 414 (1944).....6, 9, 15, 21

Statutes

42 U.S.C. § 7408.....19, 26

42 U.S.C. § 7409.....passim

42 U.S.C. § 7412.....18, 19

Regulations

62 Fed. Reg. 38,656 (1997).....16, 23

62 Fed. Reg. 38,688 (1997).....22

Constitutional Provisions

U.S. Const. art. I, § 1.....3

Other Authorities

123 Cong. Rec. S9423 (daily ed. June 10, 1977).....24

123 Cong. Rec. S9426 (daily ed. June 10, 1977).....24

H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977).....24

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INTEREST OF AMICI CURIAE[1]

The Association of American Physicians & Surgeons ("AAPS") is a nonprofit organization dedicated to defending the practice of private medicine. Founded in 1943, AAPS publishes a newsletter and journal and participates in litigation in furtherance of its goals of limited government and free markets. Central to the interests of AAPS are the enforcement of constitutional limits on the exercise of government power in general and on the administrative state in particular.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

Sweeping delegations of authority in the areas of health and medicine are extremely prone to abuse and difficult to police. AAPS has extensive experience challenging the regulatory edicts of an unresponsive federal health bureaucracy and knows first-hand the nature of administrative abuse that comes from lack of adequate legislative direction and control. AAPS thus views a revitalized nondelegation doctrine as essential to a limited government respectful of free markets and free citizens.

The Center for Individual Freedom ("CIF") is a nonprofit organization with the mission to investigate, explore, and communicate in all areas of individual freedom and individual rights. It believes that the greatness of our Constitution lies not only in its protection of individual freedom through specific individual rights forbidding certain uses of power, but also in its structural protection of freedom through the many constraints it places on *any* exercise of power. CIF thinks the nondelegation doctrine should be applied with vigor and courage. Rather than fear any resulting inefficiency from demanding that Congress itself exert more guidance on the rules governing society, we should applaud such inefficiency as a bulwark preserving individual freedom.

SUMMARY OF ARGUMENT

This brief will address the first question presented by Petitioners: Whether 42 U.S.C. § 7409, the Clean Air Act provision directing EPA to set and revise national ambient air quality standards ("NAAQS"), is an unconstitutional delegation of legislative power. It is the duty of Congress to make the value choices that are inherent in legislative decision making. While Congress may delegate the execution of those choices to various agents, it may not delegate the value choices themselves. In this case Congress has done precisely that which is forbidden. Although Congress has provided a variety of relevant considerations to be consulted in setting NAAQS, it has not provided any guidance as to how those

considerations are to be weighed against each other. Regardless whether § 7409 limits EPA to consideration of only direct health effects from pollutants or also allows consideration of the human and economic costs of pollution control, that provision constitutes an unlawful delegation insofar as it permits EPA to set nonzero NAAQS for nonthreshold pollutants but provides no intelligible principle directing EPA where to set such NAAQS.

ARGUMENT

I. CONGRESS MAY NOT DELEGATE POLITICAL CHOICES BETWEEN COMPETING AND IRREDUCIBLE VALUES.

The Constitution commands that "All legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Derived from this fundamental command, the basic statement of the nondelegation doctrine has been established for over a century:

> [W]e long have insisted that "the integrity and maintenance of the system of government ordained by the Constitution" mandate that Congress generally cannot delegate its legislative power to another Branch.

Mistretta v. *United States*, 488 U.S. 361, 371-72 (1989) (quoting *Field* v. *Clark*, 143 U.S. 649, 692 (1892)). While recognizing that Congress may seek "assistance from another branch," the nondelegation doctrine requires Congress to "lay down by legislative act an intelligible principle to which [its agent] is directed to conform." *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406, 409 (1928).

This Court has been unfailing in confirming the existence of the nondelegation doctrine and its requirement that Congress provide an intelligible principle to guide the actions of its agents. *See, e.g., A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 529-30 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legisla-

tive functions," which consist of "laying down policies" and "establish[ing] the standards of legal obligation"); *Loving* v. *United States*, 517 U.S. 748, 758, 771 (1996) ("fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress ... and may not be conveyed to another branch or entity"; "intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws").

Yet while this fundamental constitutional doctrine is oft-stated, it is rarely enforced. As this Court noted in *Loving* v. *United States*, "[t]hough in 1935 we struck down two delegations for lack of an intelligible principle, we have since upheld, without exception, delegations under standards phrased in sweeping terms." 517 U.S. at 771 (citations omitted). Unfortunately, the history of the nondelegation doctrine can seem a history filled with excuses for not applying it.

Amici respectfully suggest that if the Constitution indeed contains a nondelegation doctrine – and we believe it does – then this Court is obliged to give identifiable content to that doctrine. Declaring a constitutional principle that in practice is never enforced only reduces respect for the Constitution and encourages disregard of all constitutional boundaries. Such disregard had become apparent concerning Congress's enumerated power under the Commerce Clause, and this Court is just recently beginning to re-establish coherent constitutional limits on that power. *See United States* v. *Morrison*, -- U.S. --, 120 S. Ct. 1740 (2000); *United States* v. *Lopez*, 514 U.S. 549 (1995).[2] The Constitution's careful allocation of powers and its constraints on the means of their exercise are likewise deserving of renewed attention as they play a vi-

[2] In other areas as well, this Court has rediscovered the constitutional limits on government action. *See Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996) (Eleventh Amendment immunity); *Alden* v. *Maine*, 527 U.S. 706 (1999) (state sovereign immunity); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (limits on power under § 5 of the Fourteenth Amendment).

tal role in ensuring the limited government envisioned by the Founders and in constraining the too-easy exercise of authority at the expense of liberty.

Several members of this Court have already shown some reluctance to continue merely reciting and then ignoring the nondelegation doctrine. Thus, in a delegation case involving crimes by members of the military, Justice Thomas relied only upon the President's unique authority as Commander in Chief and significantly took "no position with respect to Congress' power to delegate authority or otherwise alter the traditional separation of powers outside the military context." *Loving*, 517 U.S. at 778 (Thomas, J., concurring in the judgment). And in a case involving regulation of health and safety in the workplace, then-Justice Rehnquist went further, writing that "[i]f we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it." *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 687 (1980) ("*Benzene*") (Rehnquist, J., concurring in the judgment). Such questioning of this Court's reticence is well-taken, especially because "ensuring" that Congress make those decisions assigned to it by the Constitution, though perhaps a "burden," is also a duty assigned to this Court by that same Constitution.

This case presents an opportunity for all members of the Court to revisit whether its nondelegation jurisprudence has drifted too far from first principles and hence distorted the constitutional scheme. It is time to return to those first principles and give content to the neglected but vital constitutional requirement that only Congress may make the laws.

A. The Nature of Legislative Action.

In order to give content to the nondelegation doctrine, it is first necessary to define that which may not be delegated – the legislative power. "The essentials of the legislative function are the determination of the legislative policy and its

formulation and promulgation as a defined and binding rule of conduct." *Yakus* v. *United States*, 321 U.S. 414, 424 (1944). Then-Justice Rehnquist in the *Benzene* case aptly characterized "the very essence of legislative authority under our system" as the making of "the hard choices, and not the filling in of the blanks." 448 U.S. at 687 (Rehnquist, J., concurring in the judgment); *see also Field* v. *Clark*, 143 U.S. at 693 (legislative power is concerned with the "expediency or the just operation" of particular commands, whereas the execution of the law turns on ascertaining "the existence of a particular fact" upon which a legislative command may be contingent); *American Trucking Ass'ns, Inc.* v. *EPA*, 195 F.3d 4, 15 (CADC 1999) ("*ATA II*") (Silberman, J., dissenting from denial of rehearing *en banc*) ("[The purpose of the nondelegation doctrine] is, of course, to ensure that Congress makes the crucial policy choices that are carried into law. The ability to make those policy choices (even if only at a broad level of generality) is what is meant by legislative power.").[3] The hard and crucial policy choices required to be made by Congress typically have one thing in common: they each involve a clash of competing values and interests that cannot be reconciled by merely mechanical methods, but must be decided by unvarnished political considerations.

This conception of legislative power fits within the broader separation-of-powers principle integral to the structure and function of our constitutional democracy. As Justice Kennedy, writing for the Court, observed:

> By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National

[3] *Cf. Mistretta* v. *United States*, 488 U.S. 361, 419-20 (1989) (Scalia, J., dissenting) ("As John Locke put it almost 300 years ago, '[t]he power of the legislative … being only [the power] to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.' J. Locke, Second Treatise of Government 87 (R. Cox ed.1982) (emphasis added).")

> Government that is both effective and accountable. Article I's precise rules … make Congress the branch most capable of responsive and deliberative lawmaking. … The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.

Loving, 517 U.S. at 757-58. Furthermore, what Justice Kennedy previously has said concerning the roles of the States and the federal government under Our Federalism is readily and appropriately transposed to the requirement of nondelegation between branches of the federal government:

> The theory that two [branches] accord more liberty than one requires for its realization two distinct and discernable lines of political accountability …. [C]itizens must have some means of knowing which of the two [branches] to hold accountable for the failure to perform a given function. '[Separation of powers] serves to assign political responsibility, not to obscure it.' … Were the [Executive] to take over the regulation of entire areas of traditional [congressional] concern, … the boundaries between the spheres of [legislative and executive] authority would blur and political responsibility would become illusory. … The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to [a single branch].

Lopez, 514 U.S. at 576-77 (alteration added, citations omitted). Like federalism, the nondelegation doctrine ensures proper accountability for difficult and perhaps divisive choices by demanding that Congress make those choices and make them in a way that is transparent to the agents who must execute them, to the courts that must review them, and to the citizens who must finally judge them.

Despite agreement about the existence and importance of the delegation doctrine, the difficulty over the years has been in applying the doctrine. That difficulty was summed up by Justice Scalia, who offered that once it is conceded that "some judgments involving policy considerations" must be left open by Congress, "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree." *Mistretta*, 488 U.S. at 415-16 (Scalia, J. dissenting). As with questions of federalism, once nondelegation questions are defined as merely ones "of degree," it becomes tempting for courts to leave nondelegation concerns to the political process and to entrust the political branches with abiding their own duty to preserve the constitutional balance. But "the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). Like federalism, the nondelegation doctrine "is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Id.* And indeed, even Justice Scalia recognizes that "[a]t some point the responsibilities assigned [by Congress to the Executive] can become so extensive and so unconstrained that Congress has in effect delegated its legislative power." *Loving*, 517 U.S. at 777 (Scalia, J., concurring in part and concurring in the judgment). The task, therefore, is to generate a workable formulation for finding where that point might be.

Amici believe that such formulation must start with a more stringent version of the intelligible-principle requirement that focuses on the necessarily political choices required in balancing competing and irreconcilable values. While no formulation can eliminate questions of degree at the margins, focusing on congressional value choices can certainly expand

the role of constitutional principle and help "prevent Congress from forsaking its duties." *Loving*, 517 U.S. at 758.

B. The Requirements of Adequate Legislative Guidance to Executive Agents.

An endlessly generous conception of the requirement for "intelligible" principles in legislation renders unenforceable the principle that in almost all instances "the basic policy decisions governing society are to be made by" Congress. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). "What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Id.* at 416. If the nondelegation doctrine is to have meaning, therefore, the requirement of an intelligible principle must itself be given intelligible content.

Amici propose that for any legislative guidance regarding further prospective rulemaking to qualify as an intelligible principle it must, in addition to the current requirements for channeling the *scope* of rulemaking authority, identify those policy values that provide both the bases of and the limits on such rulemaking and *articulate a reviewable means for resolving conflicts between and calibrating the balance among competing values.* It is only through this added element that executive agents can know Congress's legislative will and that courts will be able to distinguish between the execution of congressional policy and the administrative exercise of abdicated legislative authority.

Substantive Guidance Sufficient for Accountability. An essential means of determining whether legislation provides an adequately intelligible principle for guiding subsequent behavior is to ask if "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426. For it is only when the "legislative policies and standards [are] clear" that "judicial review of the remedies adopted by the [agency can] safe-

guard[] against statutory or constitutional excesses." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 106 (1946). In many cases, however, courts have lacked such clear guidance and thus often concluded that an agency's policy choices were unreviewable exercises of administrative discretion.

Requiring Congress to identify the values both advancing and restraining administrative action, and to address conflicts and balancing among those values, both comports with the essence of law making and lessens a central tension of administrative law: the need to judge administrative determinations but the inability to substitute judicial opinions for administrative discretion on matters of policy. When Congress then chooses to enlist agencies to execute its will, the required policy-making hierarchy will give direction to those agencies on how to make subsidiary policy decisions and will provide a legislative standard by which courts can judge those policy decisions. Executive agents thus can be made accountable not just for the process by which they make decisions, but for the substance of those decisions as well.

In addition, requiring that the fundamental value balance be part of the legislation itself (rather than hidden in the administrative process) ensures the political accountability for Congress that is a central purpose of the nondelegation doctrine. It will no longer be sufficient to articulate and take credit for only the popular half of legislative policy – such falsely singular purposes as to protect health, to feed the hungry, and to serve the public interest. Instead, Congress also will have to identify and take responsibility for the competing policies that necessarily limit such self-serving declarations of purpose. Legislation necessarily involves hard choices among competing values and interests, and forcing those choices into the law, rather than allowing them to be buried in the administrative process, ultimately "allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Loving*, 517 U.S. at 758.

Complex Facts Do Not Excuse Hard Value Choices. A reluctance to enforce the nondelegation doctrine has sometimes been attributed to the notion that in "an increasingly complex society Congress obviously could not perform its functions" without assistance from the other branches. *Opp Cotton Mills, Inc.* v. *Administrator, Wage and Hour Div. of Dept. of Labor*, 312 U.S. 126, 145 (1941). Even assuming such congressional inability were true, it nonetheless begs the question of what type of help is required or permitted. In *Amici*'s view, Congress may obtain help in analyzing complex facts, in identifying difficult policy choices and competing social values, and in studying the consequences of various legislative responses. What Congress must do for itself, however, is make the final determinations of which policies to pursue, which values will take precedence, and how far any given trade-off will go.

Although past cases are hardly uniform on the point, the concern over Congress's ability to handle complexity and detail has often – and more appropriately – been addressed to the facts and circumstances to which legislation will apply, not to the basic task of establishing relevant value hierarchies and resolving value conflicts. Thus, in *Schechter Poultry*, this Court recognized "the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly." 295 U.S. at 529-530. In *Opp Cotton Mills*, this Court was concerned that Congress not be "obliged to find all the facts subsidiary to" its legislative policy decisions. 312 U.S. at 145. And in *American Power & Light*, "the necessities of modern legislation dealing with complex economic and social problems" were said to make it inefficient to require Congress "to appraise before-hand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation." 329 U.S. at 105; *see also Field* v. *Clark*, 143 U.S. at 694 (legislature "can make a law to delegate a power to determine some fact or state of things upon which the law

makes ... its own action depend") (citation and quotation marks omitted). Thus, whatever "necessities" may arise from the complexities of modern problems, it should be sufficient for Congress to receive assistance regarding the facts and circumstances of those problems, without the need for others to also make the policy choices that will be overlaid upon those varying facts and circumstances.[4]

Any fear that requiring Congress to make even its own value choices "would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government," *Loving*, 517 U.S. at 758, is unwarranted. While there certainly are many issues vying for the attention of Congress, one might wonder whether Congress's already prodigious grasp now exceeds the scope of its constitutionally proper reach, thus creating the supposed scarcity in its available attention. As Congress's grasp is once again confined to matter genuinely involving interstate commerce, for example, it may find more time to "divert" to attending its constitutional duties when formulating legislation. Furthermore, insofar as Congress's limited capacity to make complex and difficult decisions limits the number of issues it can address or the number of laws it can pass, such limits are entirely consistent with the constitutional scheme. It may be less efficient to constrain Congress's capacity so, but such inefficiency is

[4] And if it were still deemed too burdensome for Congress to make the requisite value decisions at the outset, it could presumably seek further assistance by requesting of its agents *proposed* legislation resolving the value questions, which Congress would then approve, modify, or reject. While easing Congress's initial legislative load, such an approach would still preserve the constitutionally required checks on the adoption of a new law and would keep with Congress the affirmative responsibility for the value choices in such a new law. The D.C. Circuit below seemed to recognize this alternate course when it observed that "if EPA concludes that there is no principle available, it can so report to the Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice." *American Trucking Ass'ns, Inc.* v. *EPA*, 175 F.3d 1027, 1040 (CADC 1999) ("*ATA I*").

precisely the type of structural check that the Framers used to limit the exercise of national power. This type of limit also forces Congress to prioritize its legislative goals in light of its limited institutional resources, thus ensuring that such laws as it does pass are those most appropriate for national, rather than state or local, attention. Finally, even if it were today thought desirable to supplement congressional capacity to address multiple and complicated issues, "there are many desirable dispositions that do not accord with the constitutional structure we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous." *Mistretta*, 488 U.S. at 427 (Scalia, J., dissenting).

Post-Hoc Legislative Review Is Insufficient. The occasional suggestion that Congress's *post hoc* oversight of its agents is sufficient to overcome nondelegation problems, *American Trucking Ass'ns, Inc.* v. *EPA*, 175 F.3d 1027, 1061 (CADC 1999) ("*ATA I*") (Tatel, J., dissenting), inverts the constitutional limits on the legislative power. *Cf. INS* v. *Chadha*, 462 U.S. 919, 954-955 (1983) (Congress may not enact laws without bicameral passage and presentment of the bill to the President). Before imposing obligations on the citizenry, Congress must overcome inertia and objection and a possible veto by the President. To require instead only that Congress act as a *post hoc* reviewer of the legislative acts of its agents would transform those safeguards *against* too-facile exercise of authority into a protection *for* the unguided exercise of authority by administrative agents.

Impact on Precedent. A more stringent version of the intelligibile-principle requirement might well have changed the results of some past cases, and certainly would have required further analysis in many others. But it seems quite possible that many past results would have been the same even under such further analysis.

For example, *Mistretta* involved the special context of sentencing, in which the statute did "no more than fetter the

discretion of sentencing judges to do what they have done for generations – impose sentences within the broad limits established by Congress." 488 U.S. at 396. In addition to such context, this Court also held that Congress "in actuality ... legislated a full hierarchy of punishment ... and stipulated the most important offense and offender characteristics to place defendants within these categories." *Id.* at 377. Congress also had set statutory ranges of punishment for all crimes, further limited the deviation between minimum and maximum sentences under the eventual sentencing guidelines, and identified current average sentences as a benchmark. *Id.* at 375. And while the statute in *Touby* v. *United States* contained the seemingly broad authority to regulate new drugs that pose an "imminent hazard to public safety," it also contained quite detailed guidance as to what might constitute such a hazard. 500 U.S. 160, 165-166 (1991) (discussing multi-layered elements of the imminent-hazard determination). The statute further required separate findings that a targeted drug "'has a high potential for abuse,' that it 'has no currently accepted medical use in treatment in the United States,' and that '[t]here is a lack of accepted safety for use of the drug ... under medical supervision.'" *Id.* at 167.

Several decisions also have distinguishing elements relating to the special nature of the power at issue or the special authority of the agent. Thus, in the military-justice case of *Loving* v. *United States*, the delegated duty was "interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" 517 U.S. at 772 (citation omitted). In *Field* v. *Clark*, not only was the subject matter that of foreign relations and trade, but the alleged delegation involved a mere finding by the President of "the existence of a particular fact" and "[n]othing involving the expediency or the just operation of such legislation was left to the determination of the president." 143 U.S. at 693. And in *Yakus*, the exigencies of war may have caused this Court to be more lenient than otherwise, and even then there was at least some arguable guidance, with price-stabilization benchmarks starting at "the prices prevailing between October 1 and October 15, 1941," and later revised "on the basis of the levels which existed on September 15, 1942." 321 U.S. at 421, 423.

The point of these examples is not to pre-determine any other specific cases, but rather to show that while a reinvigorated nondelegation doctrine may well conflict with (and hence overrule) much loose language and a number of results from prior cases, it need not require repudiation of *all* results reached under more lenient past applications of that doctrine.

II. SECTION 7409 VIOLATES THE NONDELEGATION DOCTRINE BY NOT GUIDING THE VALUE CHOICES FACED BY EPA.

Applying the above principles to § 7409, Congress has passed off to EPA numerous unguided value choices inherent in setting NAAQS and consequently has violated the nondelegation doctrine. What § 7409 does is merely tout one half of the values at stake – health, safety, and welfare – without offering any intelligible principle on how much is enough. Whether viewed strictly in EPA's direct-health terms or more sensibly viewed to include the full range of monetary and human costs and benefits associated with pollution control, EPA's task under § 7409 requires the agency to make the type of fundamental value choices that Congress may not delegate.

A. The Unguided Value Choice Delegated to EPA.

The initial requirements for setting and revising NAAQS are that they must be set at levels "requisite to protect the public health" and must provide an "adequate margin of safety." § 7409(b)(1). If understood as imposing a legislative requirement of zero-harm and zero-risk, this language might provide fairly discrete, though absurd and potentially uncon-

stitutional, guidance for EPA. Thus, if one were to accept EPA's speculative and occasionally irrational linear no-threshold hypothesis regarding harm from certain pollutants, these requirements would seem to require NAAQS levels set at zero concentration.[5]

Nobody interprets § 7409 in this way, however, and therein lies the problem. Thus, while EPA views its task as being to "reduce risks sufficiently to protect public health with an adequate margin of safety," it "recogniz[es] that [PM] standards will not be risk-free." 62 Fed. Reg. at 38,656 (1997). But if it is accepted that EPA can set NAAQS that allow *some* harm to health and welfare, then the statute provides no principle – intelligible or otherwise – as to how much harm is permissible or required. "For EPA to pick any non-zero level it must explain the degree of imperfection permitted. The factors that EPA has elected to examine for this purpose in themselves pose no inherent non-delegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much." *ATA I*, 175 F.3d at 1034. In fact, § 7409 fails explicitly even to identify competing values that might justify accepting some risk of harm from pollutants, much less to prioritize or to calibrate such values against the otherwise blindly monolithic policy of protecting health and welfare against the risks of pollutants. EPA's supposed recognition that "its mandate is not to set standards more stringent than requisite to protect against health effects of public health significance," Pet. Br. 33, offers no intelligible guidance because it merely adds a second fully indeterminate standard atop the

[5] The linear no-threshold hypothesis that EPA often applies is, in many cases, demonstrably false. Vitamins and such EPA-regulated pollutants as trace minerals and radiation are unhealthful or lethal in high doses, but are essential to life in small doses. Yet EPA hypothesizes low-dose harm by extrapolating from high doses and then ignores all other consequences of its action. This approach uses tiny doses of "pollutants," which can be measured, as a surrogate for health, which cannot be measured directly.

first. Given EPA's mandate to prevent unknown harms, it is difficult to imagine *any* health effect that could not be used to justify EPA regulation.

Without intelligible principles with which to determine how much protection is enough, EPA's decisions take on airs of the absurd. The typical external constraints on such facially unlimited goals as health and safety are unavailable, hence any nonzero stopping point for NAAQS becomes either arbitrary or disingenuous. For example, the decision to permit ozone levels that cause only temporary and reversible harm to human health makes no sense in EPA's direct-health-only paradigm. Why *wouldn't* EPA prevent such harms. Surely even temporary pain and suffering have some negative value in any honest calculus of public health. In the real world, such harms might be tolerated because eliminating them would be infeasible, overly expensive, or would have other collateral consequences deemed to outweigh the potential benefits. But in EPA's surreal direct-health-only world, NAAQS must be assumed to be entirely without costs or other indirect consequences. Given such an assumption, any decision to ignore even limited harms thus is either arbitrary or is made without disclosing the actual values driving EPA's choices.[6]

[6] For nonthreshold pollutants, the only check on setting all NAAQS at zero is the possibility that a pollutant has some positive direct health effect which may outweigh its negative effects at some optimum concentration. Such countervailing direct health effects would, effectively, turn the pollutant into a *net* threshold pollutant, at which point EPA would be required to set the NAAQS at some indeterminate point below the threshold. EPA opposed even this minimal internal check on its health-related value choices, arguing that it was not obliged to look at beneficial health effects from pollutants. *ATA I*, 175 F.3d at 1051. This is bitterly ironic given that the beneficial effects of various trace pollutants might actually be easier to demonstrate than the speculative harm from low doses, and EPA's overexuberance might well be costing lives rather than saving them.

Claims of Complexity Only Mask Value Choices. In defense of EPA's unguided policy discretion, Petitioners claim that the agency must make "highly technical judgments about the health and welfare effects of particular pollutants." Pet. Br. 25. That claim ultimately misses the point. The technical judgments are just the first steps to the NAAQS – identifying various effects that may or may not justify regulation. Whether such effects are determined once, or periodically revisited "based on the 'latest scientific knowledge,'" Pet. Br. 28, does not change the fundamental nondelegation problem. For it is not the fact-finding steps, but rather the unguided final step – deciding whether it is worth it or desirable to regulate the effects so found – that violates the nondelegation doctrine. The final step is not a "technical" judgment, it is a *value* judgment that happens to have technical information as one of its considerations.

Likewise, the claim that further congressional guidance is not possible given the complex technical nature of the field is incorrect. Nothing precludes Congress from giving policy guidance that can be applied in light of such technical or variable inputs. In other sections of the CAA, for example, Congress directed EPA to require the best available technology or to target a standard based upon achievements of the best current practices in emission control. *See* 42 U.S.C. § 7412(d)(3) (basing "maximum degree of reduction in emissions" on "the emission control that is achieved in practice by the best controlled similar source"); *id.* § 7412(g)(2)(A) (referring to "maximum achievable control technology emission limitation"). Those standards offer discrete guidance while still allowing for evolving scientific knowledge.[7]

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[7] Standards with discrete or determinable external referents do not guide subsequent policy discretion, but instead represent Congress making the relevant value choice itself by providing the balance and then directing the agency to fill in the blanks. Other discrete standards of this type could be expressed in terms of percentage reductions in mortality or maximum reduction in pollution up to a specified cost, thus making the value tradeoffs but still accommodating changing knowledge. *See, e.g.*, 42 U.S.C. § 7412(c)(9)(B)(i) (delisting of certain source categories based upon the absence of "a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source").

By pretending that the NAAQS revision is merely a scientific decision, rather than recognizing it as policy and value decision based upon scientific information, EPA ultimately masks the value choices being made behind a veneer of supposedly objective science. Hiding the ball in that manner, combined with the often impenetrable morass of the administrative rulemaking process, affirmatively undermines nondelegation values by reducing accountability for EPA's unacknowledged value choices.[8]

Scientific Guidance Does Not Provide Policy Guidance. Somewhat in tension with the claimed need for broad discretion in the face of scientific complexity, Petitioners also claim that Congress has provided sufficient substantive guidance with the requirement that NAAQS must be based on the air quality criteria under § 7408, which in turn must reflect "the latest scientific knowledge" and other variable information. Pet. Br. 31. Petitioners also claim to find adequate limits in EPA's requirement to consider and explain any deviations from the advice of the Clean Air Scientific Advisory Committee ("CASAC") regarding air quality criteria and standards. Pet. Br. 23; *see also ATA I*, 175 F.3d at 1059 (Tatel, J., dissenting) (because CASAC brings "scientific methods to their evaluation of the Agency's Criteria Document and Staff Paper, CASAC provides an objective justification for the pollution standards the Agency selects").

Neither the air quality criteria nor the latest scientific information imposes any substantive limit on the final NAAQS

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[8] EPA's failure accurately to define and to acknowledge critical choices in the decision-making process also conflicts with the basics of the scientific method, which relies upon open and honest peer review and criticism to hone hypotheses regarding any given question.

that EPA may impose. They are merely factors in the mix, and absent overwhelming evidence that a pollutant could never cause harm, EPA claims it is free to impose NAAQS based on even unknown and speculative risks. *See* Pet. Br. 28. It is hard to imagine any pollutant for which EPA could not assert a basis for regulation or any NAAQS level it could not justify under these supposed limits.

For example, Petitioners' claim that existing NAAQS levels for ozone and PM were effectively an upper boundary because there were a "wide range of adverse health effects" below those levels, Pet. Br. 31, could just as easily have been inverted into a claim that such effects were insufficiently certain or did not rise to the level of a "public" health problem. The mere existence of some health effects is insufficient to require EPA to set a level lower than the prior NAAQS. And while EPA points to arbitrary lower boundaries of its own selection, Pet. Br. 31-32, those boundaries were not dictated by the statute. That EPA today came up with one result in response to various criteria does not deny that it could have come up with any other results merely by expressing a different "policy" choice. Section 7409 simply provides no limit on such choices by EPA.

CASAC's involvement likewise provides no intelligible principle directing EPA's policy discretion. EPA is free to disagree with CASAC's recommendations, and is guided only in the manner of its expressing, not in the values underlying, any potential disagreement. While CASAC may arguably provide some measure against which to test EPA's *factual* determinations, CASAC's *policy* recommendations hardly offer an "objective justification" for the eventual NAAQS. The policy preferences of scientists are no more objective than the policy preferences of EPA or of Congress. That is the nature of policymaking – it consists of choices made among competing values, not among objective facts. While CASAC may provide EPA with scientific information regarding elements of the policy choice to be made, the final

choice of NAAQS is no more scientific than any other policy decision.[9]

Procedural Checks Do Not Make Up for Substantive Limits. As for Petitioners' reliance on the various procedural checks of rulemaking and judicial review, Pet. Br. 23-24, the former does not address the substantive delegation problem and the latter is only as good as the supposedly intelligible principle set down in the first place. Procedural requirements placed on rulemaking merely seek to enhance the input, thoroughness, and instrumental rationality of agency action, but do not change the nature of the choice delegated. Such requirements may be valuable and arguably important in avoiding a due process problem, but if Congress neglects to make or guide the essential value choices, it has unconstitutionally delegated its fundamental power and duty. Instructing an executive agent to "think hard and be careful" may be sensible, but it adds nothing of substance.

For similar reasons, judicial review under the current statute does not mitigate the nondelegation problem because that review can offer no more substantive guidance or check than the statute itself. In the absence of standards from Congress, judicial review of the substance of EPA's choices would be either improper or impossible.

Thus, Judge Silberman's suggestion below to focus upon whether EPA's "final product was unreasonable" regardless of "whether the agency 'actually adhered to a disciplined decisionmaking process,'" *ATA II*, 195 F.3d at 15 (Silberman, J., dissenting) (citation omitted), simply invites courts to sub-

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[9] Even if CASAC's policy choices did have some controlling weight, that would merely constitute a further delegation to private actors with even greater problems. *See Yakus*, 321 U.S. at 424 (observing that one problem with the statute in *Schechter Poultry* was that the "function of formulating the codes [of fair competition] was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated").

stitute their unguided policy views for EPA's. Even had Congress extended such an invitation to review for substantive "reasonableness," that would not be an intelligible principle, but rather a further and improper delegation to the courts.

If the requirement of a reasoned explanation is instead treated as a requirement of some modicum of internal consistency and some evidence of actual thought, it then collapses back to a procedural check and nothing more. Any choice among conflicting and irreconcilable values is possible as long as it is explained in sufficient detail. EPA's seemingly open-ended charge to protect the public health from unknown threats based on non-causal relationships thus defies review and defies guidance. Indeed, even EPA's methodologies apparently need not be consistently applied. Petitioners essentially admit the *ad hoc* nature of every decision EPA makes, arguing that because the inputs into the NAAQS process are so variable,

> "the most appropriate approach to establishing a NAAQS with an adequate margin of safety may be different for each standard under review. Thus, no generalized paradigm ... can substitute for the Administrator's careful and reasoned assessment of all relevant health factors in reaching such a judgment."

Pet. Br. 29 (quoting 62 Fed. Reg. at 38,688). It is difficult to imagine how that *ad hoc* process can be subject to arbitrary and capricious review – it is arbitrary by definition – and it is impossible to imagine how a court could *ever* question EPA's substantive judgments under this construction of § 7409.

Legislative History Undermines a Claim to Guidance. Petitioners' reliance on legislative history as providing some supposed guidance is surprising given that they cite very little of that history. Citing briefly to the D.C. Circuit's discussion of legislative history in *Lead Industries Association* v. *EPA*, Petitioners claim that they are limited to regulating based

upon only "adverse" health effects, which must be "medically significant, not merely detectable." Pet. Br. 24 (citing 647 F.2d 1130, 1152, 1155 (CADC), *cert. denied*, 449 U.S. 1042 (1980)). Of course, Petitioners promptly contradict themselves on this point, claiming that § 7409's requirement of an "adequate margin of safety" means NAAQS should be "preventative or precautionary," Pet. Br. 24, which in turn frees EPA from the need for "rigorous step-by-step proof of cause and effect," Pet. Br. 28 (citation and internal quotation marks omitted). Indeed, Petitioners claim EPA is free to target "hazards which research has not yet identified." Pet. Br. 28 (citation omitted).[10]

This very case demonstrates the lack of EPA's claimed constraint, given the agency's willingness and ability to regulate supposed hazards of questionable medical pedigree. Thus, regarding PM, EPA admits that "the relevant toxicological and controlled human studies published to date have not identified any accepted mechanism(s) that would explain how such relatively low concentrations of ambient PM might cause the health effects reported in the epidemiological literature" and admits its lack of knowledge "whether or not a threshold concentration exists below which PM-associated health risks are not likely to occur." 62 Fed. Reg. at 38,656. In the face of such speculation, legislative history referring to "adverse" effects seems to offer no guidance at all.

The most to be gleaned from the legislative history is that Congress failed to confront the difficult choice it faced, and ultimately sent a mixed message. Thus, the House Report on the 1977 Amendments recognizes a no-risk plain reading of

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[10] One might also note that when EPA proclaims a danger from low doses of a pollutant based upon extrapolation from evidence at much higher doses, the harm is not only of doubtful significance, it is not even "detectable" at all. Yet armed with a linear no-threshold hypothesis and a charge to be preventive and precautionary, EPA imposes untold costs based on what amounts to speculation and guesswork.

the NAAQS provision, but then seems to reject such a requirement, stating: "Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical. This is particularly true in light of the legal requirement for mandatory attainment of the national primary standards within 3 years." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 127 (1977) (quoted in *Lead Industries*, 647 F.2d at 1151 n. 41). Similarly, Senator Muskie expressed his view that "there is no such thing as a threshold for health effects" and consequently, "[e]ven at the national primary standard level, which is the health standard, there are health effects that are not protected against." 123 Cong. Rec. S9423 (daily ed. June 10, 1977) (quoted in *Lead Industries*, 647 F.2d at 1151 n. 41). Senator Muskie ultimately recognized how this view was at odds with the statutory language:

> I wish it were possible for the Administrator to set national primary and secondary standards that fully implement the statutory language .... The fact is, as testimony and documents disclose, the standards do not fully protect in accordance with the statutory language which gives the Administrator authority to provide for additional protection. He has had to make a pragmatic judgment in the face of the fact that he found there is no threshold on health effects, which makes it very difficult then to apply absolute health protection, and he has not been able to do that.

123 Cong. Rec. S9426 (daily ed. June 10, 1977) (quoted in *Lead Industries*, 647 F.2d at 1153 n. 43).

Having recognized and accepted the impossibility of conforming to the statutory language, Congress nonetheless failed to offer any guidance or to amend the statute to include an alternate standard. Rather than provide constitutionally adequate guidance, the legislative history demonstrates that in the context of nonthreshold pollutants § 7409 constitutes empty posturing with which EPA could not and did not comply. Indeed, the D.C. Circuit long ago recognized that the

charge "to protect against unknown dangers" is a "veritable paradox calling as it does for knowledge of that which is unknown" and the statutory "term 'margin of safety' is Congress's directive that means be found to carry out the task and to reconcile the paradox." *Environmental Defense Fund* v. *EPA*, 598 F.2d 62, 81 (CADC 1978). But it was not until twenty years later that the D.C. Circuit recognized, in the decision below, that the only way to move past a paradox of this sort is through a naked political choice. Such paradoxical choices are among the most difficult in law making, but they necessarily belong to Congress and may not be delegated.

B. Mere Consideration of Costs and Benefits Offers No Intelligible Principle.

As noted above, *supra* at 17-19, *Amici* believe that the direct-health-only interpretation of § 7409 not only lacks an intelligible principle to guide EPA's value choices, it also invites either absurd or inevitably disingenuous results. A zero-risk, zero-concentration NAAQS, by effectively demanding the impossible, is facially absurd and, if required, would likely render § 7409 unconstitutional under the Fifth Amendment on both Due Process and Takings grounds. Alternatively, regardless whether EPA admits it, any nonzero stopping point for nonthreshold pollutants will inevitably be based on a balance of competing interests.

Given the alternatives of absurdity or dishonesty, it makes far more sense to adopt an available construction of the statute that allows the direct and open consideration of competing interests. EPA's current refusal, sanctioned by the D.C. Circuit, openly to take into account any effects other than direct health consequences from pollution is misguided and deeply troubling. Aside from ignoring or masking difficult cost and feasibility constraints that necessarily form part of any rational governmental process, EPA's blinders also ignore or mask competing *health* considerations. Thus, if an excessively stringent NAAQS diverts resources from more valu-

able efforts – even other pollution control efforts – EPA claims not to consider that when setting a particular standard. Rather than promoting health, therefore, EPA's approach could actually lead to a NAAQS that caused a *net loss* of life. Such a nonsensical construction of the statute ought to be avoided if at all possible. In that respect, *Amici* agree with Cross-Petitioners in No. 99-1426 that a more sensible construction of § 7409 is indeed available that would allow EPA to consider a variety of relevant interests.[11]

But *Amici* do not believe that the sensible inclusion of these additional considerations eliminates the nondelegation problem. If anything it potentially makes *that* problem worse. Expanding the range of values factoring into EPA's final decision, without guiding the balancing of those values, simply renders EPA's decision that much more "legislative" in nature. Without a hierarchy among the competing values, and some means of calibrating and comparing costs and benefits, the statute so construed would still lack an intelligible principle to guide EPA's substantive decisions concerning when costs exceeded benefits. As the many notable economists favoring cost-benefit analysis themselves recognize, "there may be factors other than economic benefits and costs that agencies will want to weigh in decisions, such as equity across generations," cost-benefit analysis "does not emphasize factors that are not easily quantified or monetized," and therefore it will be necessary in any such analysis to "give due consideration to factors that defy quantification but are thought to be important." Brief *Amici Curiae* of AEI-Brookings Joint Center for Regulatory Studies, *et. al.*, in No. 99-1426, at 10 (July 21, 2000). What this description illustrates is a perfectly sensible means of making legislative decisions, not an intelligible principle for an agency without legislative authority to "monetize" or otherwise give "due consideration" to competing values lacking a common denominator.

[11] *Amici* find room for additional considerations in § 7409's use of the words "requisite" and "adequate," in that section's incorporation of the criteria under § 7408, which cover more than just health, and in the requirement to consider CASAC recommendations and public comments, which need not be limited to or based solely upon health concerns.

Thus, even were EPA to develop "the rough equivalent of a generic unit of harm that takes into account population affected, severity and probability," as hypothesized by the D.C. Circuit, *ATA I*, 175 F.3d at 1039, the statute offers no guidance as to how much harm is acceptable or how much expense Congress is willing to impose for each unit reduction in harm. While identifying, categorizing, and comparing the harm from air pollution all constitute sound scientific endeavors that may properly be delegated to agents, the final decision of what to do about such harm remains a political, not a scientific, judgment.

In other contexts, this Court has recognized that "a judgment about the appropriate level of expenditure for health care in light of the associated malpractice risk" is a judgment for Congress, not the Courts. *Pegram* v. *Herdrich*, -- U.S. --, --, 120 S. Ct. 2143, 2150 (2000). Likewise, the judgment concerning the appropriate level of cost to impose in light of the associated pollution risks is for Congress and not for an administrative agency. That "debatable social judgment," similar to the "judgments of social value" involved in determining "optimum treatment levels and health care expenditure," *id.* at --, 120 S. Ct. at 2150, is the type of fundamental policy judgment that lies at the heart of the legislative power.

C. Invalidation Is The Appropriate Remedy For Improper Delegation.

Although the D.C. Circuit was correct in holding that no intelligible principle guided EPA's discretion in setting NAAQS, the proper remedy is to declare the law unconstitutional and leave it to Congress, not to the agency, to provide the fundamental guidance lacking in the current statute. While a remand might have served certain administrative-law and due-process functions, it does not serve the "key function

of non-delegation doctrine, to 'ensure[] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress.'" *ATA I,* 175 F.3d at 1038 (quoting *Benzene*, 448 U.S. at 685 (Rehnquist, J., concurring in the judgment).

As Judge Silberman correctly observed, it is "only this so-called 'third' purpose ... that has any connection to the doctrine's constitutional source." *ATA II*, 195 F.3d at 15 n. 2 (Silberman, J , dissenting from denial of rehearing *en banc*). Although Judge Silberman mistakenly concluded that there was no improper delegation, his separate critique of the remedy was on the mark:

> [The purpose of the nondelegation doctrine] is, of course, to ensure that Congress makes the crucial policy choices that are carried into law. ... It hardly serves – indeed, it contravenes – that purpose to demand that EPA in effect draft a different, narrower version of the Clean Air Act.[] Under that view Congress would be able to delegate almost limitless policymaking authority to an agency, so long as the agency provides and consistently applies an "intelligible principle."[]

Id. at 15 (footnotes omitted). The nondelegation doctrine requires that Congress actually make the hard choices and provide the substantive guidance for subsequent agency action. Delegating the task of providing guidance to the agency itself does not satisfy nondelegation requirements. If there is to be a remand in this case, it must be a remand to Congress to provide the guidance currently lacking.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the D.C. Circuit should be affirmed with instructions to invalidate the PM and ozone NAAQS.

Respectfully Submitted,

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